SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 132

YUEN KAM CHUEN and NG SUI SANG,

Petitioners,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals was entered on May 8, 1968. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Involved

1. Can the Attorney General deport an alien without any statutory authority for the method and place of deportation?

2. Where there is a legislative gap and the statute is silent as to the method and place of deportation, can the Immigration Service deport an alien to any country that they choose?

Statute Involved

Immigration and Nationality Act, §254(c), 8 U. S. C. 1284 (c):

> "(c) If the Attorney General finds that deportation of alien crewmen under this section on the vessel or aircraft on which he arrived is impracticable or impossible, or would cause undue hardship to such alien crewman, he may cause the alien crewman to be deported from the port of arrival or any other port on another vessel or aircraft of the same transportation line, unless the Attorney General finds this to be impracticable. All expenses incurred in connection with such deportation, including expenses incurred in transferring an alien crewman from one place in the United States to another under such conditions and safeguards as the Attorney General shall impose, shall be paid by the owner or owners of the vessel or aircraft on which the alien arrived in the United States. The vessel or aircraft on which the alien arrived shall not be granted clearance until such expenses have been paid or their payment guaranteed to the satisfaction of the Attorney General. An alien crewman who is transferred within the United States in accordance with this subsection shall not be regarded as having been landed in the United States."

The Facts

The petitioners are alien crewmen who came to the United States and were denied shore leave when they arrived. However, they were paroled into the United States pursuant to the provisions of Section 212(d)(5), 8 U. S. C. 1182(d)(5) of the Immigration and Nationality Act of 1952, as amended.

The petitioner, Yuen Kam Chuen, arrived December 20, 1962. The petitioner, Ng Sui Sang, arrived in the United States at the Port of New York on June 30, 1962. The petitioner, Yuen Kam Chuen, joined the vessel that brought him to the United States in London, England; and the petitioner, Ng Sui Sang, joined the vessel that brought him to the United States in Aioi, Japan. At the time of their arrival in the United States in 1962, there was a regulation in effect which barred the admission of the petitioners to the United States because they did not possess "a travel document valid for the entry of the bearer into a foreign country", §101(a)(30) of the Act, 8 U. S. C. (1958 ed.), §1101(a)(30); 8 C. F. R. (1962 Pocket Part), ¶212.1. Because of the lack of travel documents and a passport issued by the country of their nationality, they were paroled into the United States rather than being admitted as crewmen, pursuant to §252 of the Immigration and Nationality Act, 8 U. S. C. §1282. The petitioners did not return to their vessels and they have continuously resided in the United States since their respective entries. The Government, realizing and understanding that, if the aliens were to be deported from the United States, they would have to be deported pursuant to §254(c) 8 U. S. C. §1284(c) of the Immigration and Nationality Act, waited for the vessels on which the petitioners arrived to return to the United States. The Government then ordered that the petitioners' paroles be revoked and that they be placed upon the ships upon

which they had arrived to effectuate their deportation from the United States.

In 1963 an action was commenced on behalf of these aliens challenging the right of the Immigration Service to deport the petitioners from the United States without a hearing. The decision of the Court was that since they were paroled into the United States pursuant to §212 (d)(5), they were not entitled to a hearing upon revocation of their paroles and were, therefore, subject to the exclusion rather than the expulsion provisions of the statute. *Wong Hing Fun and Ng Sui Sang* v. *Esperdy,* 335 F. 2d 657 (2d Cir. 1964), cert. denied sub nom. *Ng Sui Sang* v. *Esperdy,* 379 U. S. 970 (1965).

The Government's position during the pendency of the previous litigation was that the petitioners were to be removed as parolees from the United States on the vessels that brought them to this country without naming a place of deportation. The Government has now changed its position and now wishes to deport the aliens to Hong Kong. In November of 1967, when the respondent sent notices to the aliens to surrender for deportation to Hong Kong, this action was commenced. The complaint alleged that the Government could not deport the aliens to Hong Kong merely because that country had agreed to accept them, but must comply with the provisions of Section 254(c) of the Immigration and Nationality Act, 8 U. S. C. Sec. 1284. This provision of law states, in essence, that alien crewmen paroled into the United States (as in the instant matter) may only be deported in two ways: (1) upon the vessel upon which they arrived, and (2) on any vessel or aircraft of the same transportation line. The Government is not proceeding in this fashion.

The respondent made a motion for summary judgment dismissing the complaint as a matter of law. The Dis-

trict Court (Metzner, D. J.) granted respondent's motion for summary judgment and dismissed the complaint. On appeal to the United States Court of Appeals for the Second Circuit the judgment was affirmed.

Why Certiorari Should Be Granted

The decision below raises an important question of law with reference to the deportation of paroled aliens in the United States. The controlling section of law, Section 254(c) 8 U. S. C. 1284(c), is void of the procedure by which the Government can deport the petitioners herein. The Government takes the position that since the statute is silent and an apparent legislative gap exists, that they can deport the aliens in any way they see fit. The petitioners' position is that the Government must follow the dictates of the Legislature and the Government may only deport pursuant to the statutory authority granted them by the Congress and the courts cannot extend a statute when the procedure for deportation is quite clear.

I

The petitioners were paroled into this country pursuant to Section 212(d)(5) of the Immigration and Nationality Act. The Government has now decided that their paroles should be revoked and that they should be deported to Hong Kong. There is no statutory authority, nor has the Government issued any regulations, which authorizes the deportation of the petitioners to Hong Kong. The law is quite clear—that an alien crewman who has been admitted into the United States as a parolee, can only be deported pursuant to Section 254(c) 8 U. S. C. 1284(c).

The only two sections of the law that enable the Government to deport aliens from the United States in the manner that they suggest do not apply in the instant case.

Sections 242 and 243, 8 U. S. C. 1252-3 are not applicable since the aliens have never made an entry into the United States as it has been determined by the courts that a parolee has gained no foothold into the United States. *Leng May Wa* v. *Barber*, 357 U. S. 185 (1958); *Wong Hing Fun and Ng Sui Sang* v. *Esperdy, supra.* In fact, when the petitioners in the instant case claimed that these sections should apply, they were vigorously opposed by the respondent.

The other section, an exclusion section, namely, Section 237(a) 8 U. S. C. 1227(a) specifically excludes crewmen—"any alien, other than an alien crewman". Thus we can see that the only section that can possibly apply to the case at bar is Section 254(c). Section 254(c) is very limited in nature and this was done deliberately by the Legislature. Since aliens are not entitled to hearings, the statute, of course, would have to be limited in nature. Section 254 states that the Attorney General may cause the alien crewman to be deported from the port of arrival, or any other port, on another vessel or aircraft of the same transportation line, unless the Attorney General finds this to be impracticable. The Attorney General has found this procedure to be impracticable. (This was conceded by the Government in its affidavit in support of its motion for summary judgment submitted in the District Court.) The law is silent as to the next step the Government is to take in this type of case. This gap in the statute was also conceded by the Government in its brief filed in the District Court. The silence of the statute was also mentioned in the opinion filed by Judge Metzner on page 15 of the Appendix, ". . ., but the section does not provide what procedure should then be followed".

The Government argued further, that to conclude the Attorney General could not summarily remove such an alien, would have an anomalous result. A similar situa-

tion arose in the case of *United States ex rel. Milanovic* v. *Murff*, 253 F. 2d 941. In that case, the Government contended that Section 243 applied in an exclusion case because, if it did not apply, the alien stood in a position of being *defacto* undeportable. The Court, at page 944, stated as follows: "That there may be such a statutory anomaly, does not seem to us sufficient reason to ignore the plain distinction in the statute". In the case at the bar, the Government must also follow the statutory direction. The statute limits the manner in which an alien crewman, paroled into the United States, can be deported. The Government, the Courts, and the writer agree that Section 237(a) does not apply to the petitioners. The Government concedes that Section 243 is not applicable to excluded aliens. However, the respondent has decided that it is proper for the Attorney General to send the aliens to Hong Kong. He does not state where this authority comes from. He merely urges that this is the only way the Government can remove the aliens from the United States and, therefore, deportation to Hong Kong is justified. The deportation of an alien is a serious matter and the manner in which an alien is to be deported is controlled by statute. The Government must follow the letter of the law and proceed only on the basis of the statutory authority that it has and, in the case at the bar, the authority to deport the aliens is limited.

If the decision of the Court of Appeals is permitted to stand, the powers of the deportation officers of the Immigration Service would be greatly enlarged. It was not the intention of the Congress to give a deportation officer carte blanche authority to summarily dispose of an alien, paroled into the United States, by whatever means are available to the deportation officer. A paroled alien is not entitled to a hearing, he is not taken before an impartial judge, and, there is no sworn testimony or any

evidence, adduced to substantiate the deportation charge. It is apparent to the writer that the intention of Section 254(c) is to restrict the manner in which the Government can deport a paroled alien from the United States since the paroled alien's rights to due process are so limited and narrow because of his entry into the United States. If this Court does not review this decision, a miscarriage of justice would be created.

II

When an alien is deported from the United States, he is deported pursuant to an order issued by an official with authority to issue such order. In the case of an alien deportable pursuant to Sections 242 or 243, the Special Inquiry Officer enters an order of deportation and, when the alien is physically deported, he is deported pursuant to a Warrant of Deportation which is addressed to any immigration or employee, and directs the officer to take the alien into custody and deport. An exclusion order is also an order of a Special Inquiry Officer and is considered the legal warrant for the alien's deportation and no additional documents are issued. See Gordon & Rosenfeld, "Immigration Law and Procedure".

In the case of an excluded alien crewman pursuant to Section 252, a notice to detain on board and deport must be served upon the agents of the vessel that brought the alien to the United States. In the case at the bar, there has been no valid order directing the deportation of the aliens to Hong Kong. There is no order that can be served on the airlines and, there is no order that can be given to an official of the Immigration Service to deport the aliens to Hong Kong. Therefore, the deportation of the aliens to Hong Kong would be an illegal and void act.

III

Since the aliens were paroled into the United States they have received no formal hearing nor has there been any testimony or evidence taken before an impartial officer. Because of this, there is no indication in the administrative record as to what country the aliens actually came from; there is no proof of their prior residency; there is no proof, other than the petitioners' statements, as to where they joined the vessels that brought them to the United States. It is conceded that they are natives and citizens of the Republic of China on Formosa. Because of these factors, it would be improper to permit the Government to deport the aliens to Hong Kong either as a country "from whence they came", or, as a country of their last residence.

In addition to the above, the Government has not attempted to deport them to any other country; it has not attempted to get an entry document to London, England for Yuen Kam Chuen, nor has it attempted to obtain an entry document to Aioi, Japan for Ng Sui Sang. If this Court should agree with the Court below that the Government is proceeding properly and need not expel the petitioners pursuant to Section 254(c), there certainly should be a hearing to determine the true facts with reference to the background of the petitioners in order to determine the proper countries to which they should be sent.

IV

In the opinion of the District Court, mention was made of the fact (see p. 16 of Appendix) that it might be possible for the shipping company to object to the findings of the Attorney General because it might cost the transportation line more money. This is not a factor since the cost of deportation under all the deportation statutes is

imposed upon the shipping company that brought the alien to the United States. (See Section 243(c) 8 U. S. C. 1253 (c); Section 252(b) 8 U. S. C. 1282(b); Section 253, 8 U. S. C. 1283; and Section 237, 8 U. S. C. 1227(a).

The shipping company has no choice. The deportation statutes involved individual aliens whose personal rights are affected and the laws were made to protect the aliens. That it would cost the transportation line a few dollars more or less should not in any way be considered by the courts.

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented, and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 23, 1968.

Respectfully submitted,

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APPENDIX

Order of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the eighth day of May one thousand nine hundred and sixty-eight.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

YUEN KAM CHUEN and NG SUI SANG,
Plaintiffs-Appellants,

v.

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the District of New York,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Opinion of United States Court of Appeals for the Second Circuit

No. 499—September Term, 1967.

(Argued May 8, 1968 Decided May 8, 1968.)

Docket No. 32129

YUEN KAM CHUEN and NG SUI SANG,
Plaintiffs-Appellants,

v.

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service for the District of New York,
Defendant-Appellee.

Before:

LUMBARD, *Chief Judge*,
SMITH and ANDERSON, *Circuit Judges*.

Appeal from summary judgment for the District Director of the Immigration and Naturalization Service in the United States District Court for the Southern District of New York, Charles M. Metzner, *J*.

Affirmed.

JULES E. COVEN, New York, N. Y. (Lebenkoff & Coven, New York, N. Y., on the brief), *for plaintiffs-appellants*.

DANIEL RIESEL, Special Assistant United States Attorney (Robert M. Morgenthau, United States Attorney and Francis J. Lyons, Special Assistant United States Attorney, on the brief), *for defendant-appellee.*

PER CURIAM:

We affirm in open court, essentially for the reasons given in Judge Metzner's opinion reported at 279 F. Supp. 151 (S. D. N. Y. 1968), the judgment of the District Court for the Southern District of New York which dismissed the aliens' complaint seeking a declaratory judgment that the method of deportation chosen by the Attorney General is unlawful.

Opinion of District Court by Metzner, D. J.

METZNER, D. J.:

The District Director of the Immigration and Naturalization Service seeks summary judgment in this action for a declaratory judgment brought by two alien crewmen.

It is undisputed that both plaintiffs are natives and citizens of China who last resided in Hong Kong. Both carried Hong Kong seamen's identity books. Both boarded foreign vessels as crewmen—one in England, the other in Japan. When the vessels arrived here, plaintiffs as alien crewmen, were denied permission to land pursuant to 8 U. S. C. §1282. However, they were paroled into the country while their ships remained in port, but were not to stay longer than 29 days. 8 U. S. C. §1182 (d) (5).

The plaintiffs deserted their vessels, which left without them. Subsequently plaintiffs were apprehended, their paroles were revoked and proceedings looking toward deportation were instituted. The plaintiffs were reparoled while travel arrangements were being made.

When travel arrangements were completed, the plaintiffs stayed their deportation by filing a declaratory judgment action in which they claimed that parole could not be revoked without a hearing. This issue was decided against them. See *Wong Hing Fun* v. *Esperdy*, 335 F. 2d 656 (2d Cir. 1964), *cert. denied sub nom. Ng Sui Sang* v. *Esperdy*, 379 U. S. 970 (1965). Now travel arrangements were made, but these, too, were stayed by the filing of a declaratory judgment action in which plaintiffs claimed that they were political refugees from the mainland of China. The District Director was upheld in his contention that such relief was not available to alien crewmen. See *Tai Mui* v. *Esperdy*, 371 F. 2d 772 (2d Cir. 1966), *cert. denied*, 386 U. S. 1017 (1967).

Departure by air transportation to Hong Kong has been arranged, but by this action departure has been stayed for a third time. The owners of the vessels on which plaintiffs arrived in this country have authorized the District Director to remove the aliens by air at the owners' expense.

Plaintiffs, in their complaint, claim that deportation to Hong Kong is illegal, since they are not being returned to the country from which they came, nor are they being placed upon the ships on which they entered the United States. No affidavits in opposition were submitted on this motion. The claim that deportation can be effected only to the country where they signed on the vessels has been dropped in the briefs, as it should be, since the section relied on does not apply to alien crewmen. 8 U. S. C. §1227 (a).

When parole has been revoked, the alien is considered as not being within the country. *Leng May Ma* v. *Barber*, 357 U. S. 185 (1958). The question is how should such a person be deported under the law.

The parties, in their briefs, agree that the applicable section is 8 U. S. C. §1284 (c). This section provides that if the Attorney General finds that deportation of an alien crewman on the vessel that brought him here is "impracticable" or "would cause undue hardship" to such crewman, he may be deported on another vessel owned by the same transportation company. The section goes on to state that even this mode of deportation may be found by the Attorney General to be impracticable, but the section does not provide what procedure should then be followed.

Opinion by Metzner, D. J.

Plaintiffs argue that deportation can be effected only as provided by law, and since the statute is silent as to the method of deportation when the Attorney General finds it impracticable to use the first two stated alternatives, they cannot be deported. However, this argument ignores the purpose of the section. Since the section provides that the transportation company is liable for the cost of deportation, the first two alternatives afford the company the cheapest way to discharge that obligation. It may be that the company could challenge a finding by the Attorney General that the first two alternatives are impracticable and charging the company with costs attributable to other modes of transportation. However, the company here has acquiesced in the means selected by the Attorney General.

Motion granted. So ordered.

Dated: New York, N. Y.
January 29, 1968

CHARLES M. METZNER,
U. S. D. J.